Supreme Court, U.S.
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No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1982
CERTIORARI GRANTED DECEMBER 6, 1982

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION ("EEOC"),
UNITED STEELWORKERS OF AMERICA
("STEELWORKERS")
and JOHN MCNULTY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1980	
January 31	Complaint for declaratory and injunctive relief filed.
April 1	Motion to dismiss filed by Defendant EEOC.
April 7	Motion to dismiss filed by Defendants Steelworkers and McNulty.
November 19	Order denying motions to dismiss filed.
December 15	Plaintiff's motion for summary judgment filed.
January 2	Defendant EEOC's Answer filed.
January 13	Cross motion for summary judgment filed by Defendant EEOC.
January 14	Answer of Steelworkers and McNulty filed.
January 14	Cross motion for summary judgment filed by Defendants Steelworkers and McNulty.
January 27	Opinion and order filed.
January 27	Judgment filed.
February 4	Motion to amend order filed by Defendants Steelworkers and McNulty.

Date	Proceedings
1980	
February 5	Motion to amend order filed by Defendant EEOC.
February 26	Amended opinion and order filed.
February 26	Amended Judgment filed.
March 17	Notice of Appeal filed by Defendant EEOC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-237-NN

EEOC

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

Date	Proceedings
1980	
December 15	Complaint filed.
January 14	Motion to dismiss filed by Defendant.
February 6	Order granting motion to dismiss filed.
April 1	Notice of Appeal filed by Plaintiff.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 81-1283 & 81-1307

EEOC

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

Date	Proceedings
1981	
April 6	Appeal docketed.
April 23	Order consolidating cases filed.
October 20	Appellant's Motion to supplement record on appeal filed.
January 7	Order granting motion to supplement record on appeal filed.
January 7	Decision and judgments issued.
January 19	Petition for rehearing and suggestion for rehearing en banc filed.
April 12	Order granting petition for rehearing en banc filed.
June 22	En banc decision and judgments issued.
July 9	Motion for stay of mandate filed.
July 13	Order granting stay of mandate filed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING
AND DRYDOCK COMPANY
4101 Washington Avenue
Newport News, Virginia,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

UNITED STEELWORKERS
OF AMERICA, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, Pennsylvania 15222

and

JOHN MCNULTY
3428 Stancil Street
Virginia Beach, Virginia 23452,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiff seeks a declaratory judgment and a permanent injunction against the Equal Employment Opportunity Commission's (The "EEOC") implementation and enforcement of self-styled "Final Interpretive Guidelines" concerning "The Pregnancy Discrimination Act," Pub. L. 95-555 ("The Pregnancy Discrimination Act") and Title VII of the Civil Rights Act of 1964, as amended, by the

Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), and against Defendants United Steelworkers of America, AFL-CIO-CLC (the "Steelworkers") and John McNulty, which have filed charges with the EEOC seeking enforcement, in effect, of the "Final Interpretive Guidelines" against Plaintiff.

2. The Pregnancy Discrimination Act prohibits employers from discriminating against female *employees* or female *applicants for employment* on the basis of pregnancy, childbirth or other related medical conditions, and includes pregnancy in the list of illnesses covered by an employer's fringe benefit plans.

3. The EEOC's "Final Interpretive Guidelines" extend coverage to persons that are *not* employees.

4. Therefore, the gravamen of the Complaint is that the EEOC's "Final Interpretive Guidelines" contravene the intent of Congress and are *ultra vires* the statute; are arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with law.

I. *Jurisdiction and Venue*

5. This court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

6. Plaintiff Newport News Shipbuilding and Dry Dock Company (the "Shipyard") is a corporation authorized to do business in the Commonwealth of Virginia with principal offices located at 4101 Washington Avenue, Newport News, Virginia. It is a resident of this District, and venue is therefore proper in this District under 28 U.S.C. § 1391(e).

II. *The Parties*

7. Plaintiff is a corporation authorized to do business in the Commonwealth of Virginia, and maintains a place

of business located at 4101 Washington Avenue, Newport News, Virginia.

8. Defendant EEOC is an independent agency of the United States established pursuant to Pub. L. 92-261 (42 U.S.C. § 2000(e) *et seq.*) with responsibility to prevent discrimination in employment because of race, color, religion, sex or national origin. Further, pursuant to Pub. L. 95-555, the EEOC was empowered to prohibit discrimination against female employees or female applicants for employment on the basis of pregnancy, childbirth or related medical conditions.

9. Defendant United Steelworkers of America, AFL-CIO-CLC is an association commonly known as a labor union which represents production and maintenance employees of Plaintiff for purposes of collective bargaining at Plaintiff's place of business in Newport News, Virginia, and which maintains an office at 3301 Washington Avenue, Newport News, Virginia 23607.

10. Defendant John McNulty is an employee of Plaintiff.

11. Defendants Steelworkers and McNulty are joined as parties pursuant to Rule 19(a)(2), Federal Rules of Civil Procedure, in that they have an interest in the outcome of this action.

III. *History of Charges Filed by Defendants Steelworkers and McNulty With the EEOC*

12. On September 20, 1979, Defendant McNulty filed a charge of discrimination with Defendant EEOC alleging discriminatory denial of full medical insurance coverage for his pregnant spouse. (Attached as Exhibit "A".)

13. On October 28, 1979, Defendant Steelworkers filed a charge with Defendant EEOC alleging *inter alia*, discriminatory denial of medical insurance benefits to preg-

nant spouses of Plaintiff's employees. (Attached as Exhibit "B".)

14. On September 26 and October 30, 1979, respectively, Defendant EEOC forwarded to Plaintiff a Notice of Charge of Discrimination and Notice of Fact Finding Conference with reference to Defendant McNulty's charge, and Notice of Charge of Discrimination With Copy of Charge with reference to Defendant Steelworkers charge. (Attached as Exhibits "C" and "D".)

15. On October 24, 1979, Plaintiff, through counsel, forwarded a statement of position to Defendant EEOC concerning Defendant McNulty's charge contending that (1) the "Final Interpretive Guidelines," specifically Question and Answer 21, upon which the charge necessarily was based, were *ultra vires* Title VII and (2) investigation of the charge should be deferred pending resolution of *Kansas Association of Commerce and Industry v. Equal Employment Opportunity Commission*, Civil Action No. 79-4145, currently pending in the United States District Court for the District of Kansas, and which raises, *inter alia*, the identical issue which is the subject of the instant action. (Attached as Exhibit "E".)

16. By letter dated December 20, 1979, Defendant EEOC informed Plaintiff via correspondence that it would not defer the investigation, but that the investigation in fact would continue. (Attached as Exhibit "F".)

IV. *Background of the Commission's "Final Interpretive Guidelines"*

17. Prior to the EEOC's issuance of the "Final Interpretive Guidelines" that are at issue in this matter, the EEOC interpreted Title VII to prohibit discrimination in the hiring or providing of benefits, to applicants or employees because of pregnancy, childbirth or related medical conditions. 29 C.F.R. § 1604 (1972).

18. When certain female employees of General Electric Company were denied disability benefits under their em-

ployer's disability plan while they were absent from work as a result of pregnancy, they brought suit against General Electric alleging sex discrimination in violation of Title VII as interpreted by those prior EEOC guidelines.

19. The United States Supreme Court, in *General Electric v. Gilbert*, 429 U.S. 125, on December 7, 1976 held that General Electric's disability insurance plan which excluded coverage for women with pregnancy-related disabilities did not contravene Title VII because the benefits policy was not gender-related but condition-related. Further, the Supreme Court held that because the plan did not exclude any disability that could be incurred by both men and women, the plan was not discriminatory under Title VII.

20. Following the Supreme Court's holding in *Gilbert*, on October 31, 1976, the Pregnancy Discrimination Act was enacted into law.

21. The primary purpose of the Pregnancy Discrimination Act is to prohibit discrimination with respect to pregnant *employees* and pregnant *applicants for employment*: the Act is not intended to modify existing Title VII principles with respect to spouses and dependents. In achieving the goals of the Act, employers are prohibited from employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions; required to treat pregnant employees the same as other employees on the basis of their ability or inability to work; and required to treat pregnancy, childbirth and related medical conditions the same as other disabling conditions.

22. On March 9, 1979, the EEOC published for comment in the Federal Register, Interim Interpretive Guidelines regarding the Pregnancy Discrimination Act. 44 Fed. Reg. 13278-13281 (March 9, 1979). (Attached as Exhibit "G".)

23. On April 20, 1979 the EEOC adopted its "Final Interpretive Guidelines" concerning the Pregnancy Discrimi-

nation Act, by publication in the Federal Register. 44 Fed. Reg. 23804-23808 (April 20, 1979). (Attached as Exhibit "H".)

24. The EEOC's "Final Interpretive Guidelines" published on April 20, 1979, required compliance with the Guidelines by April 29, 1979.

25. The EEOC's "Final Interpretive Guidelines" are in the form of thirty-seven (37) questions and answers rather than expository form.

26. The Shipyard challenges only two (2) of the thirty-seven (37) "Final Interpretive Guidelines," set forth in Questions and Answers 21 and 22. Plaintiff alleges that such guidelines contravene the intent of Congress; are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

27. Of those challenged, only Question and Answer 21 appeared in the EEOC's Interim Interpretive Guidelines in 44 Fed. Reg. 13278-13281 (March 9, 1979) for comment by the public.

28. The substance of Question and Answer 22 appeared for the first time in the EEOC's "Final Interpretive Guidelines" in 44 Fed. Reg. 23804-23809 (April 20, 1979) with an effective date of April 29, 1979. Therefore, the public was unable to comment to the EEOC on the legality and effect of these particular guidelines.

V. *The Pregnancy Discrimination Act and the Commission's "Final Interpretive Guidelines"*

29. The Pregnancy Discrimination Act amended Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e) *et seq.* by adding a new subsection which reads:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical

conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

30. EEOC's "Final Interpretive Guidelines" that are in dispute are Questions and Answers 21 and 22 which state:

21.Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22.Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouses must be covered at the 50 percent level.

VI. *Cause of Action*

31. The EEOC's "Final Interpretive Guidelines" Questions and Answers 21 and 22 concern the extension of employee benefits and insurance coverage, for pregnancy-related conditions, to the spouses of male employees.

32. Questions and Answers 21 and 22 *require* that if an employer's fringe benefit program covers the medical expenses of spouses of female employees, then it must also cover the pregnancy-related medical expenses of spouses of male employees. If the employer's fringe benefit program covers the medical expenses of spouses of female employees then such fringe benefit program *must* afford the same

level of benefits for the pregnancy-related medical expenses of spouses of male employees.

33. The primary purpose of the Pregnancy Discrimination Act is to prohibit discrimination with regard to the hiring or fringe benefits provided females who are *employees* or *applicants for employment* and are absent from the workplace because of pregnancy, childbirth or a pregnancy-related condition.

34. The Pregnancy Discrimination Act was not intended to apply to the spouses of male employees.

35. The extension of benefits under Questions and Answers 21 and 22 to pregnant spouses of male employees is beyond the intent of the Congress, and is arbitrary, capricious and not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

A. Declare that the Commission's interpretation of the Pregnancy Discrimination Act and Title VII involving Questions and Answers 21 and 22 contravenes the intent of Congress and is *ultra vires* the statute, is arbitrary, capricious and not in accordance with law.

B. Declare that the Commission's interpretation of Questions 21 and 22 represents a taking of Plaintiff's property without just compensation.

C. Permanently enjoin the Commission, its officers, employees, and responsible officials from enforcing "Final Interpretive Guidelines" 21 and 22.

D. Publish a notice in the Federal Register stating that "Final Interpretive Guidelines" 21 and 22 are null and void.

E. Grant such additional relief as this Court may deem just and proper.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

SHANNON T. MASON, JR.

Counsel of Record for
Newport News Shipbuilding
and Dry Dock Company

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Chicago, IL 60603
(312) 346-8000

Dated: _____

Exhibit A

CHARGE OF DISCRIMINATION

(IMPORTANT: This ... is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.)

03779-0098

Equal Employment Opportunity Commission

Jane Yanulky

(804) 340-[illegible]391

3421 Stonehill Street

Virginia Beach, VA 23452

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below.)

Newport News Shipbuilding Corp.

(804) 380-2391

4101 Washington Avenue

Newport News, VA 23607

☐ RACE ☐ COLOR ☒ SEX (Male) ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) 08-20-79

1. I was denied full medical coverage for my wife's hospitalization due to pregnancy on August 20, 1979, while covered under the Company's medical plan. I have been employed at Newport News Shipbuilding Corporation since September 1973. The Company employs over 10,000 people.

2. Upon appeal to the Personnel Director, J. R. Vermeister, I was informed that all claims would be paid in accordance with the existing plan.

   To date, no claims have been paid.

3. I believe I was discriminated against under the Company sponsored medical plan for the following reasons:

   a. Spouses of female employees covered under the plan are out on temporary disabilities are covered 100% of all medical costs.

   b. My wife was hospitalized for pregnancy and although covered under the same medical plan, the Company paid 100% of the prenatal expenses, but has limited payment of the hospital costs to a maximum of $300.00

Exhibit A

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, and year)

7-20-79

RESPONDENT'S COPY

Exhibit B

Equal Employment Opportunity Commission
Norfolk Area Office—Baltimore District
215 East Plume Street
Suite 13
Norfolk, Virginia 23510

The United Steelworkers of America, AFL-CIO-CLC acting on behalf of certain individuals named in the Third Party Certification of Charge attached hereto and by reference a part of this Charge, does hereby file this Charge on their behalf and on behalf of all other individuals similarly effected as an aggrieved class.

Our Charges are based on the following particulars:

1. Respondent Newport News Shipbuilding and Dry Dock Company employs over 10,000 employees at its place of business located in Newport News, Virginia. All individually aggrieved persons and all aggrieved members of the class named in this Charge (hereinafter referred to as "aggrieved class") are employees of Respondent at its facilities in Newport News, Virginia.

2. Respondent maintains a "Hospitalization and Medical-Surgical Plan" (hereinafter referred to as "Respondent's Plan") to pay a major part of the cost of medical and hospital care caused by non-occupational illness or accidents of employees and their dependents.

3. Respondent's Plan provides that dependents of employees are covered at the same time and with the same non-pregnancy related coverage as employees. Non-pregnancy related coverage included (among others):

> "Hospital services and other necessary services while hospitalized up to 100% of the first $750.00, then 80% of the excess up to 120 days."

4. However, maternity benefits under Respondent's Plan are limited to:

> "Up to $500 of the hospital charges . . . .", with additional allowance for hospital costs only if there is a complication of pregnancy.

5. On and at all times since April 29, 1979, dependents of members of the aggrieved class have been denied coverage under Respondent's Plan for hospital services and other necessary services while hospitalized due to pregnancy, childbirth or related causes equal to coverage provided for dependents of members of the aggrieved class should hospitalization have occurred due to causes not related to pregnancy, childbirth or related causes.

6. By said denial of equal benefits for hospitalization for pregnancy, childbirth or related causes, Respondent has violated provisions of the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964.

7. We request that the Respondent be required to:

   A. Cease all discrimination violative of the Pregnancy Discrimination Act in the provisions or the administration of benefits for pregnancy, childbirth or related conditions of its employees or their dependents in the aggrieved class; and

   B. Pay all effected individuals and members of the aggrieved class an amount equal to the difference between the benefits they should have received for pregnancy, childbirth or related conditions existing on or after April 29, 1979 had the Respondent not discriminated in the provisions and administration of Respondents Plan and the

amount in fact provided by Respondent's Plan or plans of benefits for said conditions.

Respectfully submitted by
United Steelworkers of America, AFL-CIO-CLC

/s/ Arnol Manning
ARNOL MANNING
Representative
3301 Washington Avenue
Newport News, Virginia 23607
Phone: (804) 247-5291

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
and JOHN MCNULTY,
Defendants.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COMES NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Plaintiff herein, by its attorneys, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that summary judgment be granted in favor of NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY for the relief requested in the complaint previously filed with this Court. This motion is based upon the following:

1) That the Pregnancy Discrimination Act, Pub. L. 95-555 ("The Pregnancy Discrimination Act") prohibits employers from discriminating against female *employees* or female *applicants for employment* on the basis of pregnancy, childbirth, or other related medical conditions, and includes pregnancy in the list of illnesses covered by an employer's fringe benefit plans.

2) That on April 20, 1979 the Equal Employment Opportunity Commission (the "EEOC") adopted "Final Interpretive Guidelines" concerning the Pregnancy Discrimination Act, by publication in the Federal Register, 44 Fed. Reg. 23804-23808 (April 20, 1979).

3) That the Guidelines set forth in Questions and Answers 21 and 22 extend coverage to persons who are not employees, namely the spouses of male employees.

4) That the EEOC's interpretation of the Pregnancy Discrimination Act as set forth in Questions and An-

swers 21 and 22 contravenes the intent of Congress, is *ultra vires*, arbitrary, capricious, and not in accordance with law.

5) That the EEOC's interpretation of the Pregnancy Discrimination Act as set forth in Questions and Answers 21 and 22 represents a taking of Plaintiff's property without just compensation.

6) That there is no genuine issue as to any material fact and consequently Plaintiff is entitled to summary judgment as a matter of law.

WHEREFORE, Plaintiff NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY prays that summary judgment be entered in its favor.

A Memorandum of Law has been filed in support of this Motion.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

By _____

SHANNON T. MASON

_____

GERALD D. SKONING

_____

STEPHEN T. MYKING

MASON, GIBSON, COWARDIN & SPENCER
693 J. Clyde Morris Blvd.
Newport News, Virginia 23601
804/595-7275

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
312/346-8000

Dated: December 15, 1980

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Defendants.

CROSS MOTION FOR SUMMARY JUDGMENT OF DEFENDANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Comes now the Defendant Equal Employment Opportunity Commission, by and through counsel, and respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of The Equal Employment Opportunity Commission. This motion is based upon principles of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the controlling legislative history set forth in the Defendant Commission's Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment, which was filed on or about December 30, 1980.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOHN H. GOINS
Acting Associate General Counsel
Legal Counsel Division

/s/ Anthony J. De Marco
ANTHONY J. DE MARCO
GLORIA J. LETT
Attorneys for Defendant

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6595

JUSTIN W. WILLIAMS
U.S. Attorney
For the Eastern District
of Virginia
Newport News Division

MICHAEL A. RHINE
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501
(804) 441-6331

DATE:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 80-20-NN

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Plaintiff,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Defendants.

ANSWER

Comes now the Defendant Equal Employment Opportunity Commission (EEOC) and in answer to the Plaintiff's Complaint responds to the numbered paragraphs as follows:

1. Defendant EEOC admits that it has published Guidelines and Questions and Answers concerning the Pregnancy Discrimination Act, which was enacted as an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Defendant EEOC also admits that Defendants United Steelworkers of America and John McNulty have filed charges with the EEOC alleging that the Plaintiff has violated Title VII. The remainder of the allegations in this paragraph constitutes Plaintiff's characterization of the action rather than averments of fact to which a response is required but, to the extent a response may be deemed necessary, these allegations are denied.

2. Defendant EEOC admits that the Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1974 to specifically include pregnancy, childbirth, or related medical conditions within Title VII's prohibition of discrimination "because of sex" or "on the basis of sex." However, Defendant denies that Title VII and the Pregnancy Discrimination Act extend only to female employees and female applicants for employment.

3. Denied.

4. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent that a response may be deemed necessary, these allegations are denied.

5. Denied.

6. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of these allegations.

7. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of these allegations.

8. With respect to the first sentence of paragraph 8, Defendant EEOC denies that it is an independent agency. Defendant admits the remainder of the allegations in the first sentence, but denies that it is a complete characterization of its functions and responsibilities. With respect to the second sentence, Defendant EEOC admits that it has been empowered, under the Pregnancy Discrimination Act, to prohibit discrimination against employees or applicants for employment on the basis of pregnancy, childbirth or related medical conditions, but denies that the Act extends its protections only to female employees and female applicants for employment.

9. Defendant EEOC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

10. Admitted upon information and belief.

11. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent that a response may be deemed necessary, these allegations are denied.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Defendant EEOC admits that it informed Plaintiff by letter dated December 20, 1979, that it would not honor Plaintiff's request to postpone further investigative activities.

17. Denied. The relevant EEOC Guidelines on Discrimination because of Sex which were in effect prior to the Supreme Court's decision in *General Electric Co. v. Gilbert* may be found in 29 C.F.R. § 1604.10 (1973).

18. Admitted.

19. Defendant EEOC denies that this paragraph accurately reflects the Supreme Court's holding in *General Electric Co. v. Gilbert.*

20. Defendant EEOC admits that the Pregnancy Discrimination Act was enacted after the Supreme Court's decision in *General Electric Co. v. Gilbert*, but denies that the date of enactment was October 31, 1976.

21. Denied.

22. Defendant EEOC admits that it published Interim Amendments to its Guidelines on Discrimination because of Sex as well as Questions and Answers concerning the Pregnancy Discrimination Act in 44 Fed.Reg. 13278 (March 9, 1979).

23. Defendant EEOC admits that it published final amendments to its Guidelines on Discrimination because of Sex and Questions and Answers concerning the Pregnancy Discrimination Act in 44 Fed.Reg. 23804 (April 20, 1979).

24. Denied.

25. Denied.

26. With respect to the first sentence, Defendant EEOC admits that Plaintiff is challenging two of the 37 Questions and Answers (Numbers 21 and 22) appended to the Guidelines on Discrimination because of Sex. The second sentence contains Plaintiff's characterization of its action rather than averments of fact to which a response is required but, to the extent that a response may be necessary, these allegations are denied.

27. Admitted.

28. Denied.

29. Defendant EEOC admits that the Pregnancy Discrimination Act, in part, added 42 U.S.C. § 2000e(k).

30. Admitted.

31. Denied.

32. Insofar as paragraph 32 states that Questions and Answers 21 and 22 require certain actions by employers, it is denied. In all other respects, it is admitted.

33. Denied.

34. Denied.

35. This paragraph contains conclusions of law and not averments of fact to which a response is required but, to the extent a response may be deemed necessary, these allegations are denied.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim upon which relief can be granted.

2. This Court lacks subject matter jurisdiction over this action.

3. Plaintiff cannot demonstrate that it is entitled to equitable relief in this action.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOHN H. GOINS
Acting Associate General Counsel
Legal Counsel Division

/s/ Barbara L. Neilson
BARBARA L. NEILSON
GLORIA J. LETT

Attorneys for Defendants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 653-5490

JUSTIN W. WILLIAMS
United States Attorney
for the Eastern District
of Virginia

MICHAEL RHINE
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501
(804) 441-6331

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-237-NN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY
c/o Virginia B. Woodson
4101 Washington Avenue
Newport News, Virginia 23607
Defendant.

[Filed Dec. 15, 1980]

COMPLAINT

I. JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. ¶¶ 451, 1343, and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ¶ 2000e, *et seq.*, (hereinafter "Title VII").

2. The unlawful employment practices alleged below were and are now being committed within the Commonwealth of Virginia, and the Eastern Judicial District of Virginia.

II. PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter the "Commission"), is an agency of the United States of America charged with certain litigation authority pursuant to Title VII and is expressly authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. ¶ 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant Newport News Shipbuilding and Dry Dock Company, (hereinafter referred to as "Defendant" or "Company") has been and is now a Virginia Corporation, doing business in the Commonwealth of Virginia and in the City of Newport News, where it is engaged in the business of building and repairing ships, wherein substantial amounts of goods and services cross state lines.

The Defendant has at all times relevant to this lawsuit employed more than fifteen (15) employees.

5. Since at least July 2, 1965, Defendant Newport News Shipbuilding and Dry Dock Company has continuously been and is now an employer engaged in an industry affecting Commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e(b), (g) and (h).

III. STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, persons claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging a violation of Title VII by Defendant Newport News Shipbuilding and Dry Dock Company. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company has intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2(a).

8. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company as part of the compensation of each employee has paid certain hospital and medical expenses for its employees and their dependents under a non-insured plan called "Hospital and Medical Surgical Plan".

9. Since at least July 2, 1965, and continuously up until the present time, Defendant Newport News Shipbuilding and Dry Dock Company has paid 100% of the hospital charges, including the costs of a semi-private hospital room, for dependent spouses of female employees for 120 days for all conditions, plus 80% of such costs in excess of 120 days.

10. Since at least July 2, 1965, and continuously up until the present time Defendant Newport News Shipbuilding and Dry Dock's Company has refused to pay either 100% or 80% of the hospital expenses when a male employee incurred hospital expenses for his dependent spouse for delivery or other pregnancy-related conditions but rather imposed a limit of $500 on the hospital charges for dependent spouses of male employees for delivery or other pregnancy-related conditions, for which Defendant will pay.

11. By the acts alleged in Paragraphs 9 and 10 above Defendant Newport News Shipbuilding and Dry Dock Company has discriminated, and is discriminating, against its male employees with respect to compensation, terms, conditions and privileges of their employment because of their sex.

IV. PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Newport News Shipbuilding and Dry Dock Company, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with it, from engaging in any employment practices which discriminate because of sex;

B. Order Defendant Newport News Shipbuilding and Dry Dock Company to institute and carry out policies and practices which provide equal compensation, terms, conditions and privileges of employment for its employ-

ees and which eradicate the effects of its past and present unlawful employment practices;

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described herein by providing appropriate monetary relief, with interest, in an amount to be proved at trial and such other affirmative relief as may be necessary to eradicate the effects of its unlawful employment practice;

D. Grant such further relief as the Court deems appropriate; and

E. Award the Commission its costs in this action.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JAMES N. FINNEY
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

/s/ Mollie W. Neal
MOLLIE W. NEAL
Regional Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore District Office
711 W 40th Street, Suite 210
Baltimore, Maryland 21211
(301) 962-3870

/s/ Ruth Weyand
RUTH WEYAND
Special Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

RW/clc

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 80-237-NN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NEWPORT NEWS SHIPBUILING AND DRY DOCK COMPANY,
Defendant.

MOTION TO DISMISS

NOW COMES NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Plaintiff herein, by its attorneys, and moves this Honorable Court to dismiss the Plaintiff's Complaint under Rule 12(b), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction of the subject matter and that the Plaintiff's Complaint fails to state a claim upon which relief can be granted. In support of this Motion, Defendant states:

1) The Complaint herein is based solely upon an alleged violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, by Defendant;

2) Title VII applies only to individuals with some interest in an employment relationship, either direct or indirect;

3) Plaintiff's Complaint attempts to extend Title VII to individuals with no interest whatsoever in an employment relationship, namely the spouses of male employees;

4) Plaintiff's Complaint therefore does not state a claim for which relief may be granted under Title VII of the Civil Rights Act of 1964, as amended, nor does it confer upon this Court jurisdiction over Defendant under Title VII of the Civil Rights Act of 1964, as amended, or any other federal statute.

WHEREFORE, NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Defendant herein, submits that the Plaintiff's Complaint is wholly lacking in legal merit, that this Court is without jurisdiction and that the entire Complaint should be dismissed with prejudice pursuant to the provisions of Rule 12(b), Federal Rules of Civil Procedure, with the costs of this action awarded to the Defendant, together with such other and further relief as this Court shall deem appropriate.

A Memorandum of Law has been filed in support of this Motion.

Respectfully submitted,

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY

By /s/ Shannon T. Mason
SHANNON T. MASON

MASON, GIBSON, COWARDIN
& SPENCER
693 J. Clyde Morris Boulevard
Newport News, Virginia 23601
(804) 595-7275

/s/ Gerald D. Skoning
GERALD D. SKONING

/s/ Stephen T. Myking
STEPHEN T. MYKING

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Dated: January 7, 1981

Attachment "A"

APPROVED BY OMB

3---180541 (FC81B
Expires 1-31-81

CHARGE OF DISCRIMINATION

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

CHARGE NUMBER(S) (AGENCY USE ONLY)

EEOC

03780-0434

Equal Employment Opportunity Commission

Dayton E. Yard

HOME TELEPHONE NUMBER (Include Area Code)

(804) 587-0244

8224 Julian Ave.

Norfolk, Va. 23518

NAME OF THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below.)

Newport News Shipbuilding Co.

TELEPHONE NUMBER (Include Area Code)

(804) 380-2268

1880 Washington Ave.

CITY, STATE AND ZIP CODE

Newport News, Va. 23607

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

Female

DATE(S) DISCRIMINATION TOOK PLACE (Earliest and Latest)

March 17, 1980 and Continuing

I. I have been continuously denied my benefits under the medical & Hospitalization plan provided employees and their dependents by Newport News Shipbuilding Corporation. This Company employs approximately 18000 people. I have worked for the company since April 5, 1978.

II. The Company health benefits office continuously refuses to pay the medical expenses for my wife's pregnancy in the same manner it pays for other temporary disabilities.

III. I believe that the Company discriminates against female dependents in pregnancy benefits for the following reasons:

a. My wife delivered her baby on Feb 3, 1980. During the delivery she had complications. The total bill was approximately $2088. to date the insurance has paid only $1150.00.

b. The company limits hospitalization and medical coverage for pregnancy for dependents to a $500 maximum, however for other temporary disabilities the insurance pays 100% of the first $750.00 then 80% of the excess up to 120 days.

c. Male dependants of female employees are covered in the same manner as employees.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

Date 5-14-80

Charging Party Signature

NOTARY - When necessary for State and Local Requirements

Attachment "B"

CHARGE OF DISCRIMINATION

EEOC 03779-0098

Equal Employment Opportunity Commission

John Yardley
3421 Stencil Street
Virginia Beach, VA 23452
(804) 340-0391

NAME OF THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below)

Newport News Shipbuilding Corp.
4101 Washington Avenue
Newport News, VA 23607
(804) 380-2291

☐ RACE ☐ COLOR ☒ SEX (Male) ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) 08-20-79

1. I was denied full medical coverage for my wife's hospitalization due to pregnancy on August 20, 1979, while covered under the Company's medical plan. I have been employed at Newport News Shipbuilding Corporation since September 1973. The Company employs over 10, 000 people.

2. Upon appeal to the Personnel Director, J. R. Vermeister, I was informed that all claims would be paid in accordance with the existing plan.

   To date, no claims have been paid.

3. I believe I was discriminated against under the Company sponsored medical plan for the following reasons:

   a. Spouses of female employees covered under the plan and out on temporary disabilities are covered 100% of all medical costs.

   b. My wife was hospitalized for pregnancy and although covered under the same medical plan, the Company paid 100% of the prenatal expenses, but has limited payment of the hospital costs to a maximum of $300.00

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I declare under penalty of perjury that the foregoing is true and correct.

9-20-79 Date

Charging Party (Signature)

RESPONDENT'S COPY

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE
711 West 40th Street, Room 210
Baltimore, Maryland 21211

Charge No. 037800484

DALTON E. TEED
Norfolk, Virginia
Charging Party

NEWPORT NEWS SHIPBUILDING COMPANY
Newport News, Virginia
Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that Respondent discriminated against him by providing lower medical benefits to him than those provided to female employees.

Examination of the evidence shows the following facts which indicate that there is reasonable cause to believe that the allegation is true:

The Respondent, Newport News Shipbuilding, a Tenneco Company, provides for all eligible employees a Hospitalization and Medical-Surgical Plan for Plant Protection Employees [Plan Identification Number NNS(PN)-508]. The plan was established on February 26, 1951 and is provided by the shipyard through a self-administered hospitalization plan. The employees are not required to con-

tribute to the plan and payment of benefits are made from the Company's operating funds.

With regard to the extent of benefits provided to employees, the Basic Plan provides in part the following to all employees and their eligible dependents:

—full payment of costs for a semi-private hospital room for up to 120 days

—provides 100% of the first $750. of necessary hospital services then 80% of the excess up to 120 days.

The policy further states that maternity benefits for the wife of a male employee will be covered up to a maximum of $500. of the hospital charges and 100% of reasonable and customary charges for delivery and anesthesiology.

Thus, the record shows that female employees receive benefits of 100% of hospital costs for the first 120 days for their male spouses and other eligible dependents while male employees receive a limited benefit in those instances when wives incur hospitalization costs for maternity reasons.

Therefore the Company, by providing greater coverage to female employees than that which is provided to male employees, is thereby sanctioning differential protection for covered employees which is solely gender-based and which has a disparate impact on male employees.

Further, the coverage accorded by the present plan was preceded by a plan which, prior to April 29, 1979, also provided limited coverage to female employees for maternity related hospitalization.

Thus, the record reveals that the present disparate impact on male employees had its genesis in the gender-based distinction accorded to female employees in the past.

The Commission has held that when a company provides less benefits to one class of employee than accorded to another class, and that distinction is gender-based, the policy constitutes unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. A "Notice of Conciliation Process" is attached for your information; a representative of the Commission will contact each party in the near future to begin the conciliation process.

On behalf of the Commission:

/s/ Dorothy E. Mead
DOROTHY E. MEAD
District Director

Date: Oct. 9, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1283

NEWPORT NEWS SHIPBUILDING and DRY DOCK CO.,
Plaintiff-Appellee,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants-Appellant.

No. 81-1307

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff-Appellant,
v.
NEWPORT NEWS SHIPBUILDING and DRY DOCK CO.,
Defendant-Appellee.

Consolidated Appeals from the United States
District Court of the Eastern District
of Virginia

**MOTION OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TO STRIKE, OR IN THE ALTERNATIVE, TO
SUPPLEMENT THE RECORD ON APPEAL**

The Equal Employment Opportunity Commission moves this Court to strike the partial transcript of a hearing held in *EEOC* v. *Lockheed Missiles and Space Programs, Inc.* (N.D. Calif.) filed in this Court on September 29, 1981 by appellee Newport News Shipbuilding & Dry Dock Co. In the alternative, the Commission requests that it be permitted to supplement the record in this case, as the shipyard attempts to do, with other and more relevant

material from the record in *Lockheed*. In support of this motion the Commission states:

1. The partial transcript of the hearing in *Lockheed* has no substantive bearing on this case and is thus irrelevant.

2. The sole reason for the shipyard's inclusion of this transcript is to impart the impression that the Commission has misled the Court in the present case by making errors apparently made by trial counsel in *Lockheed*.

3. Counsel for Commission in this appeal did not in any manner participate in the preparation of the *Lockheed* briefs.

4. The Commission has already acknowledged a typographical omission in its opening brief and fully rectified this mistake in its reply brief.

5. The shipyard's brief was filed on July 2, 1981. The *Lockheed* hearing occurred on June 26, 1981. There is no reason why this transcript, even if relevant, was not submitted with the appellee's brief. Instead, it was submitted on the eve of oral argument. Counsel for the Commission did not receive the transcript until one day after oral argument.

6. Thus, because the transcript is incomplete, irrelevant, and misleading, the Commission requests that it be stricken from the record.

7. In the alternative, the Commission moves to supplement the record with three letters attached to the Commission's Motion for Rehearing in *Lockheed* filed on July 15, 1981.

8. The letters are correspondence prior to the enactment of the Pregnancy Discrimination Act, between Senator Javits; Carin Ann Clauss, Solicitor of Labor; Eleanor Holmes Norton, Chair of the Equal Employment Opportunity Commission; and Drew S. Days III, Assistant Attorney General. They address the precise issue presented in this appeal: whether the PDA requires medical in-

surance coverage for the pregnancy-related expenses of spouses.

9. The letters make clear that it was the opinion of the Department of Justice, the Department of Labor, and the Equal Employment Opportunity Commission that an employer, such as the shipyard, who provides comprehensive health care coverage for dependent spouses must cover pregnancy the same as it covers all other disabilities.

10. The Commission's counsel originally became aware of this correspondence while preparing the reply brief but did not include them at the time because it was thought improper to supplement the record at that late date.

11. Now that the shipyard supplements the record with *Lockheed* documents, the Commission feels it too is entitled to submit additional clarifying material from the *Lockheed* case.

12. *Lockheed* is presently on appeal to the Ninth Circuit.

Respectfully submitted,

CONSTANCE L. DUPRE
Acting General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VELLA M. FINK
Assistant General Counsel

/s/ Melissa Langa
MELISSA LANGA
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
(202) 634-6150

October 16, 1981

Attachment A

UNITED STATES SENATE

COMMITTEE ON HUMAN RESOURCES
Washington, D.C. 20510

June 6, 1977

Dear Ms. Norton:

The Senate is now considering S.995, a bill amending Title VII of the Civil Rights Act of 1964 to include pregnancy in the definition of discrimination on the basis of sex. During hearings before the Labor Subcommittee, the Administration testified in support of the disability insurance and employment practices aspects of the bill. An area that was not addressed at the hearings, however is the possible health insurance implications of the bill for maternity and other sex-linked coverages.

It is important that the Committee receive the views of the Administration on this issue. As the Committee has scheduled no further hearings on the bill, a letter communicating your views would be most useful. Specifically, your comments on the following possible interpretations of S.995 as it may affect health insurance fringe benefit programs will be instructive to the Committee.

There are three possible interpretations of what might constitute compliance with the bill in the health insurance area. The narrowest interpretation is premised upon the fact that health insurance is today most commonly offered as a fringe benefit which protects employees from the financial liabilities connected with health care both for themselves and for their families. Thus a female employee who received benefits for her maternity coverage can be equated to a male employee who receives benefits for his wife or daughter's maternity costs. Under this interpretation, so long as maternity benefits are available on the

same basis to both male and female employees, there is no sex descrimination regardless of the scope of coverage or the level of benefit. This is because there is no disparate impact on female employees, at least where family health coverage is assumed.

A second interpretation is to compare the relative comprehensiveness of health insurance coverage for male-linked conditions to that for female-linked conditions such as maternity. Under this interpretation, compliance with Title VII as amended by S.995 will be based on a case-by-case comparison of health insurance coverage for sex-linked conditions; any restrictions that would impact more heavily on female-linked conditions than on male-linked conditions, such as relatively low dollar limitations on maternity benefits, would not be permitted.

A third interpretation is that S.995 requires equality in comprehensiveness of coverage as between male and female employees for conditions only they themselves are subject to, regardless of who else may be insured under the health plan. This approach, while similar to the bill's requirements for disability insurance, raises issues of equal treatment. For example, it may result in a health plan offering maternity benefits to female employees, but not to male employees, even though each employee insures his or her entire family and may pay equal premiums for that coverage.

Other interpretations based upon actuarial equality or equality in premium costs were each employee to purchase a separate health insurance policy are possible. The above discussion should, however, illustrate the broad range of policy choices that are presented by the proposed legislation. Some possible interpretations may require amendments to the text of the bill or may be elaborated in legislative history. In any event, the complexity of the issue is apparent to all who have dealt with it. Accordingly, your recommendations will be most carefully considered.

Finally, a related issue to that of health insurance coverage is the permissible method of compliance. H.R. 6075, parallel legislation to S.995, contains a prohibition against employers lowering existing benefits in order to comply with the bill. As the testimony we received from the Administration did not anticipate this proposal, the Committee likewise needs to know your position on a prohibition on reductions in existing benefits.

Sincerely,

/s/ Jacob K. Javits
JACOB K. JAVITS

Honorable Eleanor Holmes Norton
Chair, Equal Employment Opportunity
Commission
Washington, D.C.

Attachment B

DEPARTMENT OF JUSTICE

Washington, D.C. 20530

June 16, 1977

Honorable Jacob K. Javits
United States Senate
Washington, D.C. 20510

Dear Senator Javits:

This joint letter is in response to your June 6, 1977 letters to Secretary Marshall, Commissioner Norton and Attorney General Bell seeking our comments on certain of the possible effects of S. 995, which would amend Title VII of the Civil Rights Act of 1964, as amended, to prohibit discrimination on the basis of pregnancy related conditions.

In that letter you outlined three possible interpretations of the bill as it may affect health insurance fringe benefit programs. We agree that as presently drafted and in light of the legislative history to this point the bill is ambiguous with respect to health insurance programs and that the intent of the bill should be clarified either through legislative history or by amending the present language.

This potential problem was not addressed in the Administration's testimony on S. 995 and its companion legislation in the House, H.R. 6075. The bill focused, we believed, on the equality of benefits between male and female employees.

We note at the outset that the main thrust of S. 995 is to insure that female workers have the same opportunities to work, be promoted, acquire seniority or have their incomes supplemented in times of disability as male employees similarly capable or incapable of performing the duties of the job.

We offer the following interpretations which we believe would be most in accord with general Title VII principles, in the absence of any specific legislative history or change in language. Because the plain language of the bill mandates that all employees must be treated the same with regard to all terms and conditions of employment, including fringe benefit programs, and provides that discrimination on the basis of pregnancy is discrimination on the basis of sex, we believe that the present language of the bill would prohibit the exclusion of pregnancy coverage from a medical insurance program offered to employees, as well as prohibit any limitation on benefits for pregnancy or related medical conditions unless such limitations are imposed on all other medical conditions. And since medical insurance programs would have to cover medical costs arising out of pregnancy and related conditions for female employees, general Title VII and Equal Pay Act principles would require coverage of similar costs imposed upon male employees by virtue of the pregnancy of their wives.

On the other hand, the basic principles of Title VII would also be satisfied if medical insurance programs treated female employees and the wives of male employees equally with respect to pregnancy benefits. For while only a woman can be disabled by pregnancy, the medical *costs* of pregnancy may be borne alike by men and women. If you seek to achieve this result, however, it would be highly desirable to clarify this matter through a language change or through clear legislative history.

In your letter you also asked for our position on a provision that is contained in H.R. 6075 which provides for an effective date and prohibits employers from lowering existing benefits in order to comply with the bill. We agree that the clarification of an effective date is desirable to avoid confusion and arbitrary results.

We believe that the prohibition against lowering of benefits is desirable for a short period of time so that em-

ployees will not be deprived of existing benefits. However, we recognize that these plans must be flexible and it is our view that Title VII permits such flexibility. The main thrust of Title VII is equal treatment and requires only that an employer not act to the disadvantage of any protected group. However, there is a similar provision in the Equal Pay Act which prohibits the lowering of wages to comply with that Act.

We hope our comments have been of assistance to you in reaching a final decision on the matters we discussed. Please let us know if there is anything further we can do to assist in the preparation of this essential legislation.

Sincerely,

/s/ Eleanor Holmes Norton
ELEANOR HOLMES NORTON
Chair, Equal Opportunity Commission

/s/ Carin Ann Clauss
CARIN ANN CLAUSS
Solicitor of Labor

/s/ Drew S. Days III
DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR
Washington, D.C. 20210

[SEAL]

Jun. 28, 1977

Honorable Jacob K. Javits
United States Senate
Washington, D.C. 20510

Dear Senator Javits:

The purpose of this letter is to further clarify our letter of June 16 which was sent in response to various questions you asked concerning certain of the possible effects of S. 995. We understand that there is some confusion as to the meaning of the last sentence of the second full paragraph on page 2 of our letter. That sentence, which expressed our view that the additional medical insurance required by the bill for female employees would be required for the wives of male employees, is only applicable where the employer maintains an otherwise comprehensive health insurance plan covering both employees and their dependents. It would not apply where the employer offers health insurance to employees only. In those circumstances, it would not be necessary to cover the medical costs of a dependent wife's pregnancy.

We might also point out that this precise issue has never been adjudicated and that our statement simply reflects our view as to what the bill would require.

In addition, it has come to our attention that the first two paragraphs on page 3 of our letter may be misunderstood as suggesting that it is permissible to reduce benefits in order to remedy violations of Title VII.

The Courts and the Equal Employment Opportunity Commission have held that after a finding of discrimination under Title VII, the employer must afford the vic-

tims of discrimination the benefits which have previously been denied them. Reducing the benefits to the previously favored groups does not constitute an adequate remedy to the victims of discrimination. Rather, the Title VII remedy must include the raising of benefits of those discriminated against so that they are treated as well as those previously favored. (See *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) and *Manhart* v. *City of Los Angeles Department of Water and Power* —— F.2d —— (9th Cir. 1976) 13 FEP Cases 1625; Reh Den; 14 FEP Cases 1233). The principle that the victims of discrimination must be "made whole" for the losses which they have suffered has been articulated by the Supreme Court. (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).)

Sincerely,

/s/ Eleanor Holmes Norton
ELEANOR HOLMES NORTON
Chair, Equal Employment
Opportunity Commission

/s/ Carin Ann Clauss
Carin Ann Clauss
Solicitor of Labor

/s/ James P. Turner
JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

CERTIFICATE OF SERVICE

I certify that the motion has been mailed this day, postage prepaid, to the following counsel of record:

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October 16, 1981

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